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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FRANK HERNANDEZ LOPEZ, Defendant and Appellant.	B201883 (Los Angeles County Super. Ct. No. KA078967)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles E. Horan, Judge. Affirmed as modified.

Ann Krausz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Frank Hernandez Lopez appeals from a jury verdict finding him guilty of commercial burglary and petty theft by larceny. He argues that the trial court should have instructed the jury on theft by false pretenses. Because we conclude that sufficient evidence supported the elements of theft by larceny, we affirm his conviction. We modify the judgment to reflect 159 days of presentence custody credits.

FACTS

On April 30, 2007, cashier Lorrine Medrano was monitoring the self-checkout registers at a Wal-Mart store in Glendora. Customers could bring merchandise to the registers and scan and pay for items themselves. The computer system would occasionally notify Medrano to check the identification of a customer using a credit card.

Medrano saw two men carrying toys and other items walk to a self-checkout register. One of the men, Lopez, slid a credit card through the machine, signed the key pad, and placed the items in a shopping bag. The computer alerted Medrano and she asked Lopez for his identification and credit card. Lopez said he did not have identification, and the credit card belonged to a friend. The other man left the store.

Medrano asked for Lopez's identification two more times. Lopez walked out of the store, leaving the merchandise on the counter. Medrano printed out the receipt (the transaction had gone through); the total was $137.02.

Wal-Mart security notified Glendora police, who stopped Lopez and another man travelling on bicycles. When Lopez dismounted, he threw his jacket to the ground, and a credit card landed nearby. An officer picked up the credit card. It was a mini-ATM card in someone else's name, who did not know Lopez and had not given him permission to possess or use the card.

The information charged Lopez with one count of second degree commercial burglary in violation of Penal Code section 459, and one count of petty theft with a prior in violation of Penal Code sections 666 and 484, subdivision (a). A jury found Lopez guilty. A court trial found allegations of three prior felony convictions to be true. On August 14, 2007, the trial court sentenced Lopez to seven years in state prison and

imposed fines for restitution, parole revocation, and theft. The court awarded Lopez 106 actual days and 52 conduct credits (good time/work time) for a total of 158 days of presentence custody credits. Lopez filed a timely notice of appeal.

ANALYSIS

I. The court did not err by instructing the jury on the crime of theft by larceny

Count 1 charged Lopez with a violation of Penal Code section 484, subdivision (a), which provides: "Every person who shall feloniously steal, take, carry, lead or drive away the personal property of another . . . is guilty of theft." "Theft" in section 484 includes the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses. (*People v. Davis* (1998) 19 Cal.4th 301, 304.) The trial court instructed the jury on theft by larceny, giving CALJIC No. 14.02: "Every person who steals, takes, carries, leads or drives away the personal property of another with the specific intent to deprive the owner permanently of the property is guilty of the crime of theft by larceny. [¶] To constitute a 'carrying away,' the property need not be actually removed from the place or premises where it was kept, nor need it be retained by the perpetrator. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person took personal property of some value belonging to another; [¶] 2. When the person took the property he had the specific intent to deprive the alleged victim permanently of the property; and [¶] 3. The person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property."

Lopez does not argue that the instruction was incorrect or unclear, and on appeal such a claim would have been barred by his failure to object in the trial court. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1134.) Instead, he argues that the evidence at trial did not show theft by larceny, so that the instruction should not have been given at all. Because this claim implicates his substantial rights, we consider it despite his failure to raise it at trial. (*Ibid.*) It is essentially a claim that his conviction of theft by larceny was not supported by sufficient evidence. We review the sufficiency of the evidence by

determining, "'"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1440.)

The evidence at trial showed that Lopez took items off the Wal-Mart shelf, from which the jury could conclude that he took personal property of some value belonging to another. The evidence also showed that Lopez used someone else's credit card at the self-service counter and placed the items in a shopping bag, from which the jury could conclude that he intended to deprive Wal-Mart permanently of the items. Finally, the evidence showed that Lopez took the items off the shelf and carried them across the store to the checkout, which would allow the jury to find that he carried the property away, although the property was not actually removed from the premises. (See *People v. Davis*, *supra*, 19 Cal.4th 301 at p. 306 ["a self-service store . . . impliedly consents to a customer's picking up and handling an item displayed for sale and carrying it from the display area to a sales counter with the intent of purchasing it; the store manifestly does not consent, however, to a customer's removing an item from a shelf or hanger if the customer's intent in taking possession of the item is to steal it"].) There was sufficient evidence to support the conviction of theft by larceny, and the giving of the instruction was not error.

II. The court was not required to give an instruction on theft by false pretenses

Lopez argues that the trial court should have given an instruction on theft by false pretenses. "'A theft conviction on the theory of false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation.'" (*People v. Miller*, *supra*, 81 Cal.App.4th at p. 1440.) Unlike larceny, "'"[t]heft by false pretenses does not require that the defendant take the property; it requires that the defendant use false pretenses to induce the other to give the property to him."'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 796.)

It gains Lopez nothing to argue that the trial court should have given an instruction on theft by false pretenses, because he was properly convicted of the theft crime for which the court gave an instruction, theft by larceny. "When the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated in 1927 into the single crime of 'theft' defined by Penal Code section 484, most of the procedural distinctions between those offenses were abolished. But their substantive distinctions were not: 'The elements of the several types of theft included within section 484 have not been changed, however, and a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses.'" (*People v. Davis*, *supra*, 19 Cal.4th at pp. 304-305.) Where the defendant is properly convicted of one theft offense, it does not matter whether the evidence also supports conviction of a different theft offense. Even if the alternate theory better fits the evidence, "'"the cases all hold that a judgment of conviction must be affirmed if there is sufficient evidence to support a theft conviction on *any* theory"'" (*People v. Counts* (1995) 31 Cal.App.4th 785, 792) as long as "the offense shown by the evidence [is] one on which the jury was instructed and thus could have reached its verdict." (*People v. Curtin* (1994) 22 Cal.App.4th 528, 531.) Therefore, "the abstruse technical question of whether this crime might also have been theft on a [different] theory . . . could not result in reversal of the theft conviction." (*People v. Counts*, *supra*, 31 Cal.App.4th at p. 787.)

III. It was not error to refuse to instruct the jury on attempted petty theft

At trial, the court rejected a proposed instruction on attempted petty theft. On appeal, Lopez argues that because the theory supported by the prosecution's evidence was theft by false pretenses rather than theft by larceny, the trial court was required to instruct on the lesser-included offense of attempted theft. He points out that theft by false pretenses requires that the victim transfer ownership of the property to the defendant in reliance on the false representation. Lopez argues that the evidence required an attempt instruction because Wal-Mart did not actually transfer ownership of the goods.

As we have concluded above, however, the evidence supported a completed act of theft by larceny, because Lopez's movement of the property to the check-out counter was sufficient to show the completed crime. Because no instruction on theft by false pretenses was required, an instruction on attempted theft by false pretenses was similarly unnecessary.

IV. Lopez is entitled to an additional day of presentence custody credit

Lopez argues, and the People concede, that he is entitled to 107 rather than 106 days of actual custody, so that he should have received a total of 159 days of presentence custody credits. "As a general rule, a defendant is supposed to have the trial court correct a miscalculation of presentence custody credits. (Pen. Code, § 1237.1.) However, if — as here — there are other appellate issues to be decided, the appellate court may simply resolve the custody credits issue in the interests of economy." (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.) We shall modify the judgment to reflect 159 days of presentence custody credits.

DISPOSITION

The judgment is modified to reflect 159 days of presentence custody credits. In all other respects, the judgment is affirmed.

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WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.